IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 51 of 2002
with
CRIMINAL APPEAL No. 60 of 2002
with
CRIMINAL APPEAL No. 61 of 2002
with
CRIMINAL APPEAL No. 941 of 2001
with
CRIMINAL APPEAL No. 942 of 2001
with
CRIMINAL APPEAL No. 943 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5	Whether it is to be circulated to the civil judge ?

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DILIPBHAI HARIBHAI JOSHI - Appellant(s)
Versus
UNION OF INDIA & 1 - Opponent(s)

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Appearance :

CRIMINAL APPEAL No. 51 of 2002
MR BC DAVE for Appellant No.1
MR KP RAVAL, Additional Public Prosecutor for Respondent No.1
MR DHAVAL G NANAVATI for Respondent(s) : 2,
CRIMINAL APPEAL No.60 of 2002

MS NISHA A PARIKH for Appeallant No.1

MR KP RAVAL, Additional Public Prosecutor for Respondent No.1

MR DHAVAL G NANAVATI for Respondent(s) : 2,

CRIMINAL APPEAL No.61 of 2002

MR RAJESH M AGRAWAL for Appellant No.1

MR KP RAVAL, Additional Public Prosecutor for Respondent No.1

MR DHAVAL G NANAVATI for Respondent(s) : 2,

CRIMINAL APPEAL No.941 of 2001

MR BS PATEL for Appellant No.1

MR KP RAVAL, Additional Public Prosecutor for Respondent No.1
MR DHAVAL G NANAVATI for Respondent(s) : 2,

CRIMINAL APPEAL No.942 of 2001

MR JM PANCHAL for Appellant No.1

MR KP RAVAL, Additional Public Prosecutor for Respondent No.1

MR DHAVAL G NANAVATI for Respondent(s) : 2,

CRIMINAL APPEAL No.943 of 2001

MR BD KARIA for Appellant No.1
MR KP RAVAL, Additional Public Prosecutor for Respondent No.1
MR DHAVAL G NANAVATI for Respondent(s) : 2,
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 14/11/2006

COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. Since all these six appeals are separately filed by the appellants / original accused Nos.1 to 6 in N.D.P.S. Case No.8 of 1998 decided by the learned Special Judge, Vadodara on 22.11.2001 and since all these appeals are heard together, they are being disposed of by this common judgment and order.

2. Criminal Appeal No.60 of 2002 and Criminal Appeal No.943 of 2001 are filed by

Dr.Ajit Janaklal Jayaswal – original accused No.1 and Ashok Prahladbhai Patel – original accused No.2 against their conviction under Section-22 read with Section-8(c) and 29 as well as 9(A) read with Section-25(A) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short NDPS Act) and sentencing accused Nos.1 and 2 for R.I of 10 years with fine of Rs.1 lac and in default thereof to undergo S.I of six months. Over and above this, the accused No.2 was also awarded sentence for R.I of 10 years with fine of Rs.1 lac and in default thereof to undergo S.I of six months for the offences punishable under Section-25 of the Act. Both these sentences were, however, ordered to run concurrently.

3. Criminal Appeal No.51 of 2002 is filed by Shri Dilip H. Joshi – original accused No.3 against his conviction under Sections-22, 25 and 29 of the Act and he was sentenced for

R.I of 10 years with fine of Rs.1 lac and in default thereof to undergo further S.I of six months for each of the offences committed under Sections-22 and 25 of the Act. Both these sentences were, however, ordered to run concurrently.

4. Likewise Criminal Appeal No.61 of 2002 is filed by Shri Yaduvendrasinh P. Dhilon – original accused No.4 against his conviction under Sections-22 and 29 of the Act and he was awarded sentence for R.I of 10 years with fine of Rs.1/- lac and in default thereof to undergo further S.I of six months.

5. Criminal Appeal No.942 of 2001 is filed by Shri Maheshkumar D. Patel – original accused No.5 against his conviction under Section-25(A) read with Section-29 of the Act and he was awarded the sentence for R.I of 10 years with fine of Rs.1/- lac and in default thereof to undergo further S.I of six months.

6. Criminal Appeal No.941 of 2001 is filed by Shri Sunil Kshatriya – original accused No.6 against his conviction under Section-25(A) of the Act and he was awarded sentence of R.I of 5 years with fine of Rs.50,000/- and in default thereof to undergo further S.I of 3 months.

7. Facts of the case have been detailed in the order and judgment of the learned Special Judge, Vadodara and, therefore, it is not expedient to repeat the same all over again in verbatim and in detail in this judgment. However, the basic facts which are necessary to be discussed in these appeals are as under:-

8. On receipt of specific information by an officer of Anti Terrorist Squad – ATS, Ahmedabad and in turn on passing of this information to the Zonal Director of Narcotic

Control Bureau (NCB), Zonal Unit, Ahmedabad on 11.3.1998 that mandrax tablets were being manufactured in the business premises of Rollex Pharmaceuticals Ltd., at & P.O. Rania, Tal. Dist. Baroda, by and under the guidance of Shri Ajit Janaklal Jaiswal – accused No.1 herein with the help of Shri Dilipbhai Haribhai Joshi – Managing Director of Rollex Pharmaceuticals Ltd., and Shri Ashokbhai Parahladbhai Patel and the said tablets would be ready for delivery by 12-3-1998. The said information was reduced in writing. After discussing the said information, the officers of Narcotics Control Bureau, Zonal Unit, Ahmedabad and Police Officers of Anti Terrorist Squad, Ahmedabad including Zonal Director, Narcotics Control Bureau and Dy. Superintendent of Police, Anti Terrorist Squad, Ahmedabad went to Baroda near GSFC, Baroda crossing at National Highway No.8 on 12.3.1998. After confirmation from the source, panchas were called at point near

GSFC, Baroda crossing at National Highway No.8. The officers appraised the panchas of the information and shown search warrant issued by Zonal Director, Narcotics Control Bureau, Ahmedabad in the name of Rollex Pharmaceuticals authorising Shri Jitendra Raghuwanshi, Intelligence Officer, Narcotics Control Bureau, Ahmedabad to search the said premises and requested them to accompany the search party to witness the search. The panchas were also requested to take personal search of all officers of the N.C.B and A.T.S and their vehicles.

9. On reaching the factory premises of Rollex Pharmaceuticals Ltd., it was noticed that there was no door or gate which could be closed. Only there was vacant place between two walls from where vehicle could enter into the factory premises and on entering the premises a white car was noticed parked under porch alongwith four persons standing behind

it. On close scrutiny of the said car it was further noticed that the dicky of the said car was kept opened. The raiding party has asked the four persons standing thereby to disclose their identity. As per disclosure these four persons are Dilipbhai Hariprasad Joshi, Ajit Janakbhai Jaiswal, Lalchand Dhanraj Kukreja and Ashokbhai Prahladbhai Patel. All officers of the NCB and ATS disclosed their identity and they have informed these four persons about their right to be searched in the presence of gazetted officer or a Magistrate. They have also offered their personal search as well as search of their vehicle. Nothing incriminating was found either from them or their vehicles.

10. During the search of white premier NE Car bearing registered No.GJ-6 AA 4671, two plastic bags containing brownish tablets were found from the dicky of the car. On being

asked about the tablets they were identified as mandrax tablets. In the meantime a person entered the premises. He was questioned about his identity and purpose of visit to the premises. He has identified himself as Sardar @ Yaduvendra Singh Puran Singh Dhillon of Ahmedabad. The raiding party has thereafter searched the factory premises and during the course of search of factory two plastic bags to some extent similar to two bags found from the aforesaid car were found from the room marked as “RM Store”. A weighing machine was also kept there. The bags were opened in the presence of panchas and the accused. From the plastic bags brownish tablets were found which were similar to the tablets found earlier from the car. The accused No.3 was asked whether he possessed any license or any permit to manufacture the tablets, the answer was in negative. All the four bags were weighed on the machine which was lying there and the

total weigh of all the four bags came to be 79.86 kgs. One tablet from each bag was tested with the Narcotics drugs testing kit and the result shown from all four tests was positive of Methaqualone. Four samples of 5 gms each (8 tablets) from each bag were drawn in the presence of the panchas and accused No.3. Thus, 5 gms tablets each were put in separate 16 polythene covers and stapled and thereafter wrapped with papers, tied with thread from two sides and all the 16 packets were heat sealed with Narcotics Control Bureau, AZU-1 Brass seal. Officers, panchas and accused No.3 affixed their signatures with date on a piece of paper, which was put below the seal. All four bags containing mandrax tablets have been wrapped with cloth which was stitched and heated with the same seal. The panchas, officers and accused No.3 affixed their signatures with date on the paper slip which was put underneath the seal.

11. The raiding party has also searched other room marked as “Capsule Department” and they have also taken search of the machine. Some brownish powder was found on the machine named as Rotary Tableting Machine of 16 Station. Upon testing, the said powder was also shown the positive test of Mathaqualone. The powder being 15 gram was also taken by way of sample and same sealing procedure was adopted by the raiding party. The raiding party have also collected steel dies and punchs. Thus, NCB Officers seized in all 79.86 kgs of Mandrax tablets, dies and punchs, Rotary Tableting Machine and car bearing registration No.GJ-6 AA 4671 under the panchnama dated 13.3.1998.

12. Statement of the accused Nos.1, 2, 3 and 4 was recorded under Section-67 of the NDPS Act on 13.3.1998 and 16.3.1998. Statement of accused No.4 was recorded on 23.3.1998,

26.3.1998 and 21.4.1998. Statement of accused No.6 was recorded on 21.4.1998.

13. Accused Nos.1, 2, 3 and 4 were arrested on 13.3.198 and remanded to judicial custody from time to time and on the date of filing the complaint by the Intelligence Officer – Shri D.N.Oza in June, 1998, they were lodged in Baroda Central Jail. Accused Nos.5 and 6 were arrested on 21.4.1998 in connection with the sale and purchase of acetic anhydride a controlled substance, which was used in manufacturing of the Mandrax tablets. Both these accused have been remanded to judicial custody from time to time and they were lodged in Baroda Central Jail on the date when the complaint was filed.

14. During the investigation, report of Forensic Science Laboratory (FSL) on the sample which was collected in presence of panchas and sent for analysis was received

which revealed that the contraband article, namely, Mandrax tablets contained Mathaqualone psychotropic substance. On the basis of the statements of the accused recorded under Section-67 of the NDPS Act it was revealed that all the 6 accused have committed offence under the provision of NDPS Act and, therefore, a written complaint for the offence punishable under Sections-22, 25 and 29 read with Section-8(c) of the NDPS Act was filed in the Court of learned Sessions Judge, Vadodara and the same was registered as NDPS Case No.8/1998. Alongwith the complaint list of documents like panchnama, seizure report under Section-57 of the NDPS Act and statements recorded under Section-67 of the NDPS Act. Seizure report, inventory report and FSL report were also produced.

15. Learned Special Judge, on the basis of averments and allegations made in the complaint, framed charge against all the

accused at Ex.43 on 17.5.1999 for commission of the offence punishable under Section-22 read with Section-8(c) and 29 and 25(A) read with Section-9(A) of the NDPS Act. The charge was read over and explained to the accused. The accused pleaded not guilty to the charges levelled against them and claimed to be tried.

16. In order to bring home the charge framed against the accused, prosecution has examined following witnesses and relied upon their oral testimonies.

1.PW No.1-Ramesh Babu Kondapani Naydu Ex.62
2.PW No.2 -Ashok Jayantilal Shah Ex.86
3.PW No.3 -Jitendra N. Raghuvanshi Ex.104
4.PW No.4 -Pavansinh Tomar Ex.146
5.PW No.5 – Vivek Shrivastav Ex.153
6.PW No.6 -Dr.Nirmal Jagdishkumar Ex.160
7.PW No.7 -Amish R. Moriya Ex.169
8.PW No.8 – Devendra Nanalal Oza Ex.177

17. Prosecution also placed reliance on the following documents to prove the culpability of the accused.

1.Panchnama dated 12.3.1998 Ex.63

2.Panchnama of residence of accused No.1 Ex.64

3.Panchnama Ex.87

4.Summons and statement of accused No.3 Ex.106 to 107

5.Summons and statement of accused No.1 Ex.110 to 112

6.Summons and statement of accused No.4 Ex.113 and 114.

7.Summons and statement of accused No.1 to accused No.4 Ex.120 to 123 and 129 to 136.

18. The prosecution has also relied on the report of Shri J.N.Raghuvanshi – Ex.144 confidential information passed on to Shri P.S.Tomar by ATS – Ex.155 and gist of

information.

19. After recording of the evidence of the prosecution witnesses was over, the learned Judge explained to the accused the circumstances appearing against them in the depositions of the witnesses. Thereafter, further statements of the accused were recorded under Section-313 of the Code. In further statement also they denied the prosecution case in toto and reiterated that they are innocent, they have not committed any offence, that they have been falsely implicated in the offence punishable under NDPS Act. They did not lead any evidence in defence nor they examined themselves on oath.

20. On appreciation, evaluation and analysis of the evidence adduced by the prosecution, the learned Judge held that the prosecution has proved beyond doubt that all the accused have committed offence under

Sections-8(c), 22, 25, 25(A) and 29 of the NDPS Act and resultantly the learned Judge has convicted and sentenced the accused to which reference is made in earlier paragraphs of this judgment, which has given rise to the present appeals.

21. Mr.B. C. Dave, learned advocate appearing in Criminal Appeal No.51 of 2002 for the appellant / original accused No.3 has submitted that the appellant was wrongly convicted and sentenced under the provisions of the NDPS Act, as the case against the appellant was not proved beyond reasonable doubt, in absence of any evidence whatsoever connecting the appellant with the crime. He has further submitted that the mandatory provisions of the NDPS Act have not been properly complied with and in that view of the matter the appellant ought to have been acquitted from the charges levelled against him in view of the judgment of the Hon'ble

Apex Court as well as of this Court. He has further submitted that the complaint against the appellant as well as other accused has been filed in the Sessions Court instead of Special Court constituted under the Act and no process has been issued by the Sessions Court. He has, therefore, submitted that the cognizance taken by the learned Sessions Judge was bad in law and as a result thereof trial is liable to be vitiated. He has further submitted that the officers of the Narcotic Control Bureau are not the Police Officers, and hence the complaint should have been filed before the Special Judge and since it was not filed, the cognizance taken by the learned Sessions Court is in violation of the mandatory provisions contained in the Act. He has further submitted that the officers of the Narcotic Control Bureau are not the officers as defined under Section-42 of the Act and hence they have no power to record the statement under Section-67 of the Act.

He has further submitted that if the so called confessional statements recorded by the officers are taken out from the evidence, no case remained against the appellant and hence the appellant is required to be acquitted. He has further submitted that even otherwise the joint operation, search and seizure have been conducted in the presence of the Police Officers and, therefore, any statement recorded under Section-67 of the Act would be hit by Section-25 of the Indian Evidence Act. He has further submitted that the information received by the Anti Terrorist Squad has not been proved on record on the basis of which the whole operation has been carried out. Any action taken in pursuance of the said information is therefore illegal and entire trial thereon is therefore required to be vitiated. He has further submitted that the muddamal register has not been produced on record to prove that the officers of the

Narcotic Control Bureau have deposited the muddamal as well as sample drawn by them. He has further submitted that the Station House Officer has also not applied his own seal on the muddamal bulk and muddamal samples. He has, therefore, submitted that there are all possibilities of tempering with the samples and benefit of doubt is required to be given to the appellant. He has further submitted that there were material discrepancies about the seals applied by the search officer on the samples on the one hand and the report submitted by FSL and the deposition of so called independent panch witnesses on the other hand. He has further submitted that the so called confessional statements recorded under Section-67 of the Act were under threat, duress and compulsion. Even otherwise, the said statements were subsequently retracted by the appellant. Having regard to all these aspects of the matter, he has requested the Court to reverse

the finding given by the learned Sessions Judge and pass an order for acquittal of the appellant.

22. Miss Nisha Parikh, learned advocate appearing in Criminal Appeal No.60 of 2002 for the appellant – original accused No.1 has submitted that the appellant was wrongly convicted and sentenced under the provisions of the NDPS Act despite the fact that the mandatory provisions of the Act as well as Criminal Procedure Code have not been complied with. She has further submitted that the statements attributed to the appellant were not voluntary and could not be used as evidence against the appellant. She has further submitted that the prosecution has failed to establish the case of the appellant beyond the reasonable doubt. She has further submitted that the ingredients of the offences of which appellant has been charged were not established by the cogent

and reliable evidence. She has further submitted that the documents on which the conviction was based, do not seem to have been proved in accordance with law and they do not have such probative value as would justify conviction of the appellant on the basis of the contents thereof. She has further submitted that the mandatory provisions of NDPS Act had not been complied with and, therefore, the conviction of the appellant on the basis of evidence led by the prosecution is not sustainable. She has further submitted that the statements recorded under Section-67 cannot be used against the appellant as the appellant has not been made aware by the officers that the statement would be used against the appellant. She has further submitted that while drawing the panchnama at the residence of the appellant despite the fact that the appellant was present, his signature was not obtained on the panchnama. She has further

submitted that the entire trial was proceeded without necessary compliance of the procedure laid down in Criminal Procedure Code and without observing the provisions of the NDPS Act. She has further submitted that the appellant is in jail from March, 1998 and more than 8 years have passed. The punishment imposed is of 10 years. The appellant is the doctor and holding the Ayurvedic Degree and he is the only earning member in the family. She has, therefore, submitted that even if this Court is of the view that the conviction is required to be upheld in that case the appellant may be released from the jail after awarding the sentence undergone by the appellant.

23. Mr.Rajesh M. Agrawal, learned advocate appearing in Criminal Appeal No.61 of 2002 for the appellant – original accused No.4 has submitted that the judgment and order of conviction passed by the learned Special

Judge is ex-facie, illegal and hence the same is required to be interfered with by this Court in the interest of justice. He has further submitted that the appellant was not present and his presence is not shown in the vardhi received by the police. Even the report at Ex.144 does not reflect as to how many persons are arrested as per the case of the prosecution panchnama at Ex.63. The appellant entered in the factory premises, however no such thing is being reflected in the panchnama. Even deposition of panch witness – Rameshbabu does not reveal that any person has entered when the panchnama was prepared and hence only on the basis of statement of the appellant recorded under Section-67 of the NDPS Act it cannot be held that there was any link to connect the appellant with the crime. He has further submitted that it is the case of the prosecution that the appellant has entered in the factory premises with a view to

purchase tablets as he has given order in advance. It is also the case of the prosecution that part of the amount was paid and remaining amount of Rs.2 lacs were required to be paid by the appellant. The prosecution has however miserably failed to prove any transaction. On the contrary, no amount was recovered or discovered from the appellant and it was found that the appellant was alone without any vehicle. He has, therefore, submitted all these discrepancies in the evidence produced by prosecution cannot be said to be minor in nature as observed by the learned Special Judge and relying upon the said evidence the appellant could not have been convicted. He has further submitted that the Narcotic Control Bureau is not entitled to file case under the provisions of NDPS Act and prosecution witness – Raghuvanshi is not empowered to record the statement under Section-67 of the NDPS Act. He has further submitted that the

mandatory provisions which are required to be followed have not been followed and hence the appellant is entitled to the benefit of doubt.

24. Mr.Agrawal has further submitted that even if the case of the prosecution is examined by own evidence of the prosecution, namely, information which was received by the Narcotic Control Bureau initially, nothing was mentioned with regard to the present appellant / original accused No.4 or even the information which was subsequently produced, there also name of the appellant was not found. The panchnama which was produced at Ex.63 though the said panchnama was prepared when the raid was carried out, even in that panchnama also the name of the appellant was not figured. It was not stated in the panchnama that during the course of preparing panchnama any such person entered in the factory premises. Even panch witness –

Rameshbabu who has been examined at Ex.62, has also not stated anything in his deposition. He has, therefore, submitted that the prosecution has miserably failed to prove his case beyond reasonable doubt against the appellant. On the contrary, the case of the prosecution is full of shadow of doubt. He has further submitted that even in the deposition of Mr.D.N.Oza, member of raiding party at Ex.177 nothing is reflected about the appellant. He has further submitted that there is settled principle of criminal jurisprudence that the confessional statement can be recorded only after informing the concerned person that he is not bound to give any statement and if any statement is given, it can be used against him and provisions of Section-67 of the Act do not carve any exception to the said rule. He has further submitted that the officer incharge who has recorded the statement under Section-67 of the Act has not taken precaution as contained

under Section-164 of the Criminal Procedure Code.

25. Mr.Agrawal has relied on the decision of Hon'ble Supreme Court **in the case of A.K.Mehaboob vs. Intelligence Officer, Narcotic Control Bureau, reported in (2001) 10 Supreme Court Cases 203**, wherein dealing with the case of appellant in that case the Court noticed that Ex. P-9 statement attributed to that appellant does not contain any inculpatory statement which would involve him either in a conspiracy or in an abetment for the offences committed by the other accused. The worst part in the statement Ex. P-9 is that he was informed that brown sugar could be supplied to him and he went to the house of A-2 in response to that. It was admitted by the prosecution that no brown sugar had been given to him pursuant to the said offer nor did the appellant part with any money as consideration thereof. The

Court further noticed that the members of the Bureau did not recover any money from the appellant. In this context, the Court observed that the price of 1 kg of brown sugar ranges from Rs.75,000/- to Rs.95,000/-. So, if the appellant had gone to purchase it, it cannot be expected that he would have gone without any cash with him. In view of the matter, the Court held that it is very difficult to convict the appellant on the strength of the statement contained in Ex. P-9. Relying on this decision Mr.Agrawal has submitted that except the statement recorded under Section-67, which is also not voluntary one, there is no independent or corroborated evidence which would justify the conviction and sentence of the appellant. He has, therefore, submitted that the appeal of the appellant is required to be allowed and the appellant is required to be acquitted from the charge levelled against him.

26. Mr.B.S.Patel, learned advocate appearing in Criminal Appeal No.941 of 2001 for the appellant – original accused No.6 has submitted that the allegations against the accused No.6 in the complaint are that for manufacturing mandrax tablets accused No.1 had purchased raw material from accused No.5. The present appellant i.e. Accused No.6 had been summoned and his statement had been abstracted under which it has been stated by the appellant that the appellant had supplied acetic anahydrate to accused No.5 and ultimately accused No.5 had supplied the same to accused No.1 and accused No.1 was manufacturing mandrax tablets with the help of the said material and other raw-material. The accused No.6 was alleged to have been stated in his statement that he had purchased the said raw-material from one person from Halol who was known as Mr.Panchal. The accused No.6 had got no knowledge regarding use of acetic anahydrate in manufacturing

mandrax tablets. The father of the accused No.6 retracted the statement recorded by the investigating agency falsely and under pressure. The charge had been framed against all the accused by the learned Additional Sessions Judge for the offence under Section-25A, 9A and 29 read with Section-120B of the IPC. The accused No.6 approached this Court by filing Criminal Revision Application No.292 of 1999 and this Court vide its order dated 29.9.1999 partly allowed the said Criminal Revision Application and deleted the charge under Section-120B of the IPC. He has further submitted that the learned Special Judge has seriously erred in accepting the retractive statement of the appellant, which was not otherwise probable and admissible in evidence. He has further submitted that the learned Special Judge has seriously erred in not separating the trial of the appellant even after admission by the investigating officer regarding absence of

conspiracy. He has further submitted that the accused No.6 had got no knowledge of manufacturing mandrax tablets with the help of acetic anahydrate. He has further submitted that for sale and purchase of acetic anahydrate no permission or license is necessary, but, only information is required to be given to the concerned department. He has further submitted that even in the statement of the accused No.1 recorded on 13.3.1998 under Section-67 of the Act it is nowhere revealed that the accused No.6 is connected with the alleged offence. He has further submitted that even in the statement of accused No.5 i.e. Maheshbhai Dahyabhai Patel recorded under Section-67 of the Act it is clearly deposed that he had purchased acetic anahydrate from the accused No.6 and one Amitbhai. The said Amitbhai had not been impleaded as an accused. He has further submitted that the statement of the accused No.6 recorded under Section-67 of the Act on

21.4.1998 was not correctly appreciated by the learned trial Judge and wrong conclusion was drawn that the accused No.6 had admitted his involvement in the illegal sale and purchase of acetic anahydrate. He has further submitted that even as per the statement of other two accused, it is not established that acetic anahydrate had been utilised for the manufacturing of mandrax tablets. On the contrary it is established that acetic acid has been used for the manufacturing of mandrax tablets. He has further submitted that the statement of the accused No.6 recorded under Section-67 of the Act which was retracted subsequently cannot be relied upon in view of law laid down by the Hon'ble Apex Court **in the case of Kashmira Singh Vs. State of M.P. AIR 1952 SC 159** and also on the ground that the independent evidence is not available qua the appellant in the present case.

27. Mr.B.D.Karia, learned advocate appearing in Criminal Appeal No.943 of 2001 for the appellant – original accused No.2 has submitted that the prosecution has not proved beyond the reasonable doubt the case against the appellant – original accused No.2. He has further submitted that the investigation was carried out in the doubtful manner and does not inspire any confidence so as to come to the only conclusion that the offence under Section-22 read with Section-8(c), 29, 25A and 9A of the Act has been committed by the appellant.

28. As far as the statement recorded under Section-67 of the Act is concerned, Mr.Karia submitted that the said statement is not voluntary statement because the same was taken in presence of Police Officers of ATC by the officers of NCB. The said statement was taken pursuant to summons dated 13.3.1998 issued by Shri Jitendra Raghuvanshi, Seizing

Officer, after completion of Panchnama at 00.30 hours on 13.3.1998. At that point of time summons was served upon the appellant in person and immediately thereafter his statement, the alleged voluntary statement, under Section-67 of NDPS Act was recorded in presence of ATS Officers. He has, therefore, submitted that the said statement under Section-67 of the NDPS Act cannot be said to be a voluntary statement and amounts to statement before a Police Officer and, therefore, it is not admissible in evidence keeping in view the provisions of Section-25 and 26 of the Evidence Act. He has further submitted that on perusal of Section-67 of NDPS Act it is clear that any officer referred to in Section-42 of the Act who is authorised to call for information during the course of an enquiry has power to require any person to produce any document or examine any person acquainted with facts and circumstance of the case and in the present case the

statement under Section-67 of the NDPS Act is not admissible evidence when the same was given in the presence of ATS Officers, who are Police Officers and, therefore, statement cannot be said to be without threat or inducement and it would be a statement made before the Police Officers. He has further submitted that the circumstance in which the statement under Section-67 of NDPS Act was recorded also goes to show that the said statement was not a voluntary statement and as such the statement of the appellant recorded after drawing the seizure memo/ Panchnama cannot be used against him. He has further submitted that the statement recorded was not meant for gathering information as meant for Section-67 of the NDPS Act but it was meant for the purpose of recording the confession of the accused/appellant. He has further submitted that the said statement was retracted by the appellant in his further statement dated 27.5.1993 and also his

statement under Section-313 of the Code of Criminal Procedure and as such the statement under Section-67 of the Act cannot be relied upon.

29. With regard to non-compliance of provisions contained under Section-42 of the Act Mr.Karia has submitted that Section-42 of the Act provides that an officer having power to entry, search and seizure and arrest without warrant or authorisation has to take down in writing the information given by any person regarding the commission of offence under NDPS Act. Such requirement is mandatory requirement and violation thereof is fatal. A Statutory provision has been made in the NDPS Act keeping in view the heavy punishment which is liable to be imposed in case a person is found guilty of a particular offence and, therefore, it is incumbent upon the officers authorised under Section-42 of the Act to see that the statutory provisions

contained in Sections-42 to 55 of the NDPS Act are complied with. These provisions have been made so as to ensure a fair investigation of the case has been brought under the NDPS Act. Mr.Karia further submitted that the provisions contained in Section-42(2) of the Act are also not complied with inasmuch as that as per the mandatory requirement, as a copy of the information taken down in writing within 72 hours has not been sent to the immediate official superior. The said mandate of Sub Section (2) of Section-42 of the Act is also not complied with. He has further submitted that from the provision of Section-42 of the NDPS Act, it is clear that in the present case, the authorised officer under Section-42 of the Act, Shri P.S.Tomar who is Zonal Director of NCB has not taken down in writing the information given by the Superintendent of Police Shri Vivek Shrivastava (ATS) on the ground that he has received the information

in writing from Shri Vivek Shrivastava and, therefore, he did not think it fit to take down the same in writing. He has further submitted that from the entire evidence on record the prosecution has failed to show the compliance of mandatory provisions of Section-42 of the Act of taking down the information in writing and as such the entire trial is vitiated. In support of this submission, he relied on the decision of the Hon'ble Supreme Court **in the case of Beckodan Abdul Rahiman Vs. State of Kerala** wherein for non-observance and violation of the mandatory provisions contained in Sections-42(2) and 50 of the Act, the accused was held to be entitled for acquittal.

30. Mr.Karia has further submitted that the deposition of panch PW-1 is not reliable and it does not inspire any confidence and is doubtful due to the various factors. He has submitted that the panch – Shri Rameshbhai

Kondapani Naidu, who is an Income-tax Officer has given his deposition at Ex.62 like a parrot narrating in detail the happening and chain of events from 12.3.1998 till 13.3.1998 like reading a written paper. He has shown his ignorance to know Mr.Tomar, Zonal Director, NCB with whom he stayed more than the appellant but, however, he identified the appellant in the Court immediately. He admitted the presence of Mr.Tomar through out the proceedings. Inspite of this admission, he pretended to be not knowing Mr.Tomar in person. Mr.Tomar whose parent department is Income-tax always selects one panch of Income-tax Department and examines only one panch in trial, that too, of Income-tax Department. Though the panch admits that his superior officer Mr.Chetram had introduced to the officer of the raiding party he is not able to say whether the persons whom he accompanied from his office were present during the proceedings of raid or not. Panch

admits that it is true that he had signed the panchnama without reading it. He has also admitted that he had signed the panchnama in the trust of the writer and that it is out of his sight that panchnama refers about the presence of ATS officers. He has also admitted that it is true that not a single detail of panchnama was dictated by him to Mr.Raghuvanshi, Seizing Officer. He has also admitted that he did not agree with the reciting of panchnama to the effect that it was dictated by panch. He has admitted that the appellant accused No.2 was not let off after completion of panchnama on 13.3.1998. He has also admitted that at circuit house at Baroda he had signed certain papers and what paper he had signed he was not able to say. He has further submitted that during the raid, apart from the accused Nos.1, 2 and 3 there were other two persons but he did not know whether the panchnama contained Lalchand's name. He has also admitted that

having seen the persons of raiding party, accused Nos.1, 2 and 3 continued their work of loading material in the Car. He has stated and admitted that two packets found from the car were not sealed and it was not correct to say that he had deposed that packets were sealed before entering factory. He has also deposed that sample of 3 to 4 tablets were taken in total six polythene bags but before the Court each polythene bags contains 6 tablets. Mr.Karia has submitted that it is clear that the deposition of panch Rameshbabu Kondapani Naidu is not reliable and the trial Court has therefore erred in relying on the said deposition in proving the panchnama at Ex.63.

31. With regard to the fact that the prosecution has not joined Lalchand Kukreja as an accused Mr.Karia submitted that taking into consideration the various aspects highlighted by him and the evidence on

record, more particularly, when it was found that Lalchand Kukreja who was present during the course of raid and who was found to be in knowledge of manufacturing of mandrax tablets by accused Nos.1 to 6 and whose name was given by the accused No.1 in his statement under Section-67 and whose presence is found and proved by the deposition of PW-1, PW-2, PW-3 and PW-4 the prosecution has conveniently not shown him as accused for the reasons best known to him nor he was examined as witness, which clearly shows the dishonest way of investigation creating a doubt about the investigation and, therefore, the sterling quality of the evidence of the officers of the NCB, PW-3 Jitendra Raghuvanshi and PW-4 Pavansingh Tomar looses its significance and the same cannot be relied solely to convict the appellant accused.

32. Mr.Karia in support of above submission

relied on the decision of Hon'ble Supreme Court in the case of **Pradeep Narayan Madgaonkar etc. vs. State of Maharashtra, reported in AIR 1995 Supreme Court 1930**, wherein after observing that the panch witnesses were not from the locality where search was being conducted and that their evidence was not trustworthy and that failure of police to join any independent witness of locality created doubt about fairness of investigation it was held that the accused would be entitled to benefit of doubt.

33. Based on the aforesaid submissions and authorities relied upon, Mr.Karia has emphatically urged before the Court that the appellant – original accused No.2 deserves to be acquitted as it is not safe to rely upon the evidence relating to alleged search and recovery and the appellant is entitled to the benefit of doubt as on independent appraisal of the evidence on record the prosecution has

failed to bring home the charge of the appellant accused No.2 beyond reasonable doubt and hence the conviction and the sentence of the appellant is required to be set aside by releasing the appellant accused No.2 from the custody forthwith.

34. Mr.J.M.Panchal, learned advocate appearing in Criminal Appeal No.942 of 2001 for the appellant – original accused No.5 have submitted that there is no prima facie case against the appellant accused No.5 and no evidence is disclosed against him. The evidence led qua the appellant – accused No.5 is not believable and probable at all. He has further submitted that the learned Special Judge has materially erred in relying upon the interested testimony of the officers. There are material contradictions, omissions, improbabilities and infirmities in the evidence of highly interested witnesses and panch witnesses and, therefore, the

conviction and sentence, qua the appellant – accused No.5 is required to be held as null and void. He has further submitted that the prosecution has merely and solely relied on the evidence consisting of interested officers and looking to this evidence, it is crystal clear that there is breach of many provisions of law and, therefore, there is a valid ground to believe that the interested officers have not performed their duty lawfully. He has further submitted that the strict compliance of the provisions contained under Sections-41, 42, 50, 52 and 55 of the Act have not been proved. He has further submitted that at the time of search and seizure the appellant accused No.5 was not present. Further more, in the statements alleged to have been recorded immediately of accused Nos.1 to 4 and one Lalchand, who were present did not attribute any act to the accused No.5. Thus, it was only an after thought whereby the accused No.5 had been

wrongly implicated in the alleged offence and deliberate attempt was made to create an evidence against him. He has further submitted that Lalchand was present at the time of search and seizure and who allegedly introduced accused No.5 to the accused No.1 and who supplied material to accused No.1 on the belief that the same were to be used for manufacturing of Ayurvedic medicine was not examined without any explanation, though he was very material witness. He has further submitted that the accused No.5 had not supplied any material much less any controlled goods to accused No.1. It is further submitted that the accused No.5 was convicted despite the fact that there was not even an iota of evidence about the knowledge of accused No.5 regarding manufacturing of mandrax tablets by accused No.1 and procurement of material for the same. He has further submitted that the supply of the alleged material by accused No.5 and its

identity has not been proved and on that ground the accused No.5 ought not to have been convicted. He has further submitted that the muddamal was not properly proved in para-29 of the deposition at Ex.62. Panch witness – Rameshbabu has failed to explain the variance between the sample sealed at the time of alleged panchnama and those produced at the time of trial. He has further submitted that the statement of accused No.1 which was recorded on 13.3.1998 at Ex.112 and on which reliance was placed by the learned Special Judge for convicting the accused No.5 reveals that acetic acid was supplied to the accused No.1 by Shri Lalchand, who in turn procured the same from accused No.6. The said Lalchand has not been impleaded as an accused. It is so done because according to the investigating agency and as believed by the learned Special Judge the said Lalchand was given to understand by accused No.1 that the material alleged to have been obtained

from the accused No.5, was to be used for the purpose of preparation of Ayurvedic medicine. It is the case of the single transaction allegedly of supply of material by accused No.5 at the instance of Lalchand. Mr.Panchal has, therefore, submitted that the accused No.5 could not be expected to know why Lalchand procured Acetic Acid from the accused No.5. Mr.Panchal has further submitted that the Acetic Acid is not a controlled good and hence no offence can be said to have been committed by the accused No.5. It is further submitted that admittedly in the present case provisions of Section-120(B) of the IPC are not attracted at all and it should also make it clear that each one is liable for individual act and when the accused No.5 did not have any knowledge that the acetic anahydrate which he was to supply would be used for the purpose of manufacturing mandrax tablets. He has, therefore, submitted that no offence

could be said to have been committed by the accused No.5. He has further submitted that the statement recorded under Section-67 of the Act could not have been relied upon as the same have been recorded without complying with the provisions contained in the said Section. He has further submitted that the appellant's conviction is based on uncorroborated, retracted and extra judicial confession, which has resulted into miscarriage of justice. Mr.Panchal has further submitted that the appellant has retracted his confessional statement at the time of recording his further statement under Section-313 of the Criminal Procedure Code. For this purpose he relied on the decision of the Hon'ble Supreme Court **in the case of Chandrakant Chimanlal Desai vs. State of Gujarat, reported in 1992 Supreme Court Cases (Cri.) 157**, wherein the confession of an accused No.1 was retracted at the time when the accused was questioned under Section-313

of the Criminal Procedure Code. In considering the reliability of this confessional statement of the accused, the Hon'ble Supreme Court has referred to its earlier judgment in the case of Kashmira Singh v. State of M.P. AIR 1952 SC 159 and extracted the following passage there from;

"The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section-3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if

believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

35. Mr.Dhaval Nanavati, leaned advocate appearing for Narcotic Control Bureau in all these six appeals on the other hand has strongly supported the case of the prosecution and submitted that the learned trial Judge after proper appreciation of facts and considering the relevant statutory provisions and applying the decided cases to the facts of the present case, has come to the just and proper conclusion and rightly convicted all the six accused and hence this Court should not disturb the finding and conclusion arrived at by the learned trial Judge.

36. While dealing with the submissions of the appellants with regard to non compliance of the statutory provisions contained in the Act, Mr.Nanavati has submitted that the provisions contained in Sections-41, 42, 43, 50 and 52 have been duly complied with. He has submitted that Mr.Tomar, Director, NCB was a Gazetted Officer and he has reason to believe on the basis of information given in writing by Mr.Shrivastva that offence of manufacturing of narcotic controlled drug has been committed at M/s. Rolex Pharmaceuticals. He immediately authorised Mr.Raghuvanshi – I.O – a subordinate officer under him but superior in rank to search the factory building and to seize the contraband articles. Mr.Tomar is authorised officer under Sub Section (2) of Section-42 of the Act and hence requirement under Section-41(2) have been complied with. He has further submitted that the information was received

by the Police Inspector, Anti Terrorist Squad, Mr.Ram Gadhia, that a mass production / manufacturing of mandrax tablets would take place on 12.3.1998 and 13.3.1998 at Rolex Pharmaceuticals Company and he immediately contacted the superior officer Shri Shrivastav, S.P. ATS and passed the information in sealed cover. Shri Shrivastav, S.P then contracted Shri Tomar – Director, NCB a known officer to him in the NCB and parted the information about the Narcotic Drugs which were to be manufactured at the factory premises of Rolex Pharmaceuticals Company at Baroda. Thereafter, Shri Tomar and Shri Shrivastav have chalked out the program of raid / operation at the said factory premises. It was also decided that the raid was to be carried out by the officers of the NCB, and the officers of the ATS would help them in the said operation. He has further submitted that Sub Section-2 of Section-42 of the Act

requires that information should be reduced into writing and copy be sent to his immediate superior officer. Where the information about the commission of the offence is received in advance should be reduced in writing. It is a mandatory on the part of the officer concerned to take down and send a copy to his superior officer without any delay. The requirement of law in such a case is considered to have been satisfied. He has submitted that in the present case the Police Inspector has received information which he has taken down in writing and put in sealed cover and handed over to superior officer Shri Vivek Shrivastava, S.P. ATS within no time and the said S.P in turn handed over the said information in writing in sealed cover to Shri Tomar, Zonal Director, NCB. Thus, the requirement of law under Section-42(2) of the Act has been fully complied with.

37. Mr.Nanavati further submitted that even the requirement laid down under Sections-43 and 52 have been complied with. Shri Jitendra N. Raghuvanshi – I.O NCB was authorised by Shri Tomar, Director, NCB who himself was a Gazetted Officer under Section-41(2) of the Act to search and seizure in any public place any narcotic drugs or psychotropic substance or controlled substance in respect of which he has reasons to believe that an offence punishable under this Act has been committed.

38. In support of the submissions of Mr.Nanavati with regard to due compliance of statutory provisions he relied on following decisions.

(a) In **M. Prabhulal V/s. Assistant Director, Directorate of Revenue Intelligence, AIR 2003 S.C. 4311**, the Hon'ble Supreme Court has held that when the Gazetted Officer has himself conducted the search, arrested the accused and seized the contraband, he was acting

under Section 41 and, therefore, it was not necessary to comply with Section 42.

(b) In **G. Srinivas Gaud V/s. State of A.P., (2005) 8 SCC 183**, the Hon'ble Supreme Court has held that provisions of Sub-section (2) of Section 42 are meant to cover cases falling under section 42 (1). Therefore, the requirement under Section 42 (2) need not be extended to cases of arrest, search and seizure by officers of Gazetted rank. The Officer of Gazetted rank while authorising junior Officers under Section 41 (2) knows what he is required to do and, therefore, there is no need for reporting. For this reason, Section 41 does not contain any such requirement. The need for reporting under Section 42 (2) arises because the Officer proceeds without authorisation in terms of Section 41 (1) or 41 (2). The requirement of informing the immediate official superior under Section 42 (2) has to be confined to cases where the action is taken by officers

below the rank of Gazetted officers without authorisation.

(c) In **Mahamad Parvezkhan Mahmad Faruqkhan Shaikh and another V/s. State of Gujarat, 2006 (2) 47 (2) G.L.R. 925**, the Division Bench of this Court has held that where search and seizure of narcotic substance took place in public place, provision of Section 43 of the Act would apply in such a case and contentions based on Sections 41 & 42 cannot be entertained when seizure is from a public place. The Court further took the view that requirement to take down information in writing as envisaged in Sections 41 (2) and 42 (1) of the Act, no particular mode is prescribed for this purpose. Mere mention about receipt of information in report to higher officer or in panchnama or in movement register can be treated as compliance of the requirement.

39. Mr.Nanavati further submitted that

requirement laid down under Section-67 of the Act has also been complied with. Requirement of Section-67 is that any officer referred to in Section-42 of the Act who is authorised in this behalf by the Central Government during the course of any inquiry in connection with the contravention of any provisions of this Act to call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provision of this Act or require any person to produce or deliver any document or thing useful or relevant to the inquiry or examine any person acquainted with the facts and the circumstance of the case. He submitted that in the present case Shri Jitendra N. Raghuvanshi, I.O, NCB has been authorised by Shri Tomar, Director, NCB a Gazetted Rank Officer of the Central Government mentioned in Section-42 of the Act to enter into search any such building, place or seize any Narcotic Control Drug, material used in the

manufacture or article used in such manufacture of the Narcotic Control Drug which are used for the purpose of commission of any offence punishable under the Act and the order to that effect was issued in the name of Shri Raghuvanshi by Shri Tomar, Director. Acting on the specific order issued in his favour, Shri Raghuvanshi has issued summons to all the accused persons who were present at the factory premises of M/s.Rolex Pharmaceuticals calling upon them to give the information about the offence committed by them and subsequently a statement under Section-67 was asked to be recorded of those accused persons in their own hand writing. Thus, the requirement of Section-67 is fully satisfied. He has further submitted that the statement recorded under Section-67 of the Act is admissible in nature.

40. Mr.Nanavati further submitted that all

through out during the time of summons and recording of the statements none of the accused persons have made any grievance either before the Gazetted Officer Shri Tomar who was all through out present during the entire raid or before the Magistrate at the time of production of the accused. It is for the first time during the deposition before the trial Court the accused persons have made grievance that statements were given under the threat or duress. Even the learned Special Judge has rightly come to the conclusion that all the statements recorded were voluntary in nature.

41. In support of the submissions of Mr.Nanavati on confessional statements of accused recorded under Section-67 of the Act he relied on the following decisions;

(a) In **Husen Bhenu Malad and Others V/s. State of Gujarat and Others, 2003(2) G.L.H. 705**, the Division Bench of this Court,

wherein one of us, A.M. Kapadia, J. is a party, has held that it cannot be laid down as an absolute rule of law that the statement of an accused recorded under Section 108 of the Customs Act and Section 67 of the NDPS Act cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. To put it differently, there is neither rule of law nor of prudence that the statement cannot be acted upon without corroboration. If the Court is satisfied that the statement is true and voluntary in nature, it can base conviction on it without corroboration. The Court has to scrutinise the statement carefully and must ensure that the statement is not result of coercion, duress or undue influence.

(b) In **M. Prabhulal V/s. Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449**, the Hon'ble Supreme Court has held that the accused – appellants in that case

did not make any complaint before the Magistrate before whom they were produced complaining of any torture or harassment. It is only when their statements were recorded by the Trial Judge under Section 313 of Criminal Procedure Code that a vague statement about torture was taken. Under these circumstances, the confessional statements cannot be held to be involuntary. The statements were voluntarily made and can, thus, be made the basis of conviction.

(c) In **Mukesh Natvarlal Modi V/s. H.S. Barot and another, 1998 – XXXIX (1) G.L.R. 639**, the Division Bench of this Court has held that statements of accused and his family members were recorded by Customs Officers and since Customs Officers not being Police Officers, these statements are admissible in evidence.

(d) In **Usmanbhai Chandbhai Mansuri V/s. State of Gujarat and another, 2003 (3) XLIV (3) G.L.R. 1082**, the Division Bench of this Court has held that it is settled position that

safeguards in respect of recording confessional statement as contained in Section 164 of the Criminal Procedure Code are not required to be followed by the empowered Officer, while recording statement under Section 67 of the NDPS Act until requirement is to ascertain whether such statement is voluntary or not.

(e) In **Surendra Kathadbhai Jebalia V/s. State of Gujarat, 2003 (3) XLIV (3) 2096**, the Division Bench of this Court has held that conviction can be found on retracted confessional statement of accused. If the statement was voluntary and it was true, then even if it is retracted, the inculpatory statement could be relied upon to base conviction. At the most, it would be required to examine the evidence and look for circumstances or evidence to reassure itself about the confessions made. The Court has found as a matter of fact that there is ample evidence regarding involvement of accused

Nos. 3 to 5 & 6 in a narcotic crime, as they are found to be transporting Mandrax tablets in large quantity. There is oral evidence of Officers of D.R.I. and panch witnesses which connect them with the contraband. Their statements under Section 67 are only additional factors to lend support to the prosecution case. The Court further held that there is no dispute that a series of statements were recorded from many of the accused persons. But that by itself is not a ground to infer that the statements were given under duress. It cannot be overlooked that persons involved in such organized criminal activity would not readily volunteer to give inculpatory statement. In such situation, a tactful and specialised method of interrogation may be required to be resorted to which may help in bringing out the truth and, therefore, repetitive statements by themselves cannot vitiate the statements with duress. This by itself will

not affect the prosecution case.

(f) In **Surjeet Singh Chhabra V/s. Union of India and others, (1997) 1 SCC 508**, the Hon'ble Supreme Court has held that in view of the confession made by the importer – petitioner that he had purchased the gold and brought the same, he is bound by the same and the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. The customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So, there is no need to call panch witnesses for examination and cross-examination by the petitioner.

42. Mr.Nanavati has further submitted that the present case is a case instituted against the complaint and it is for the complainant to decide the consideration of the material before him as to against whom it would be proper to file a complaint. He has submitted

that there was no information that Shri Lalchand Kukreja was involved in the manufacturing of the mandrax tablets. He was dealer dealing in chemicals. He was told by Dr.Ajit Jaiswal, accused No.1 that certain chemicals were required for the manufacturing of Ayurvedic Medicine, so Shri Kukreja had to arrange for the required raw material. Accused N.1 – Jaiswal with whom he had gone to the factory alongwith the raw material has clearly stated during investigation that Lalchand did not know that he was going to get mandrax tablets manufactured. Even Shri Lalchand Kukreja in his statement under Section-67 has narrated the fact that Dr.Ajit Jaiswal has contacted him and informed him that he had an order of making one lac Ayurvedic tablets and for which he required certain raw materials and also requested him to arrange for the same. It is clear from the statement of Shri Lalchand, though it is not on record nor exhibited, that Lalchand might

have helped Dr.Jaiswal and other accused in grinding the chemicals and preparing tablets from the powder without knowing as what was the nature of the tablets. In these circumstances, if there is a reason to believe on the part of the I.O that Lalchand is not involved in manufacturing mandrax tablets and on that belief if no complaint was filed against him, it cannot lead to the conclusion that merely because the I.O has given a benefit of doubt to Shri Kukreja, the other accused against whom there is a clear, cogent and ample evidence, are entitled to get the benefit of doubt. He has submitted that for the fault of the prosecution the perpetrators of a ghastly crime cannot be allowed to go scot-free.

43. Mr.Nanavati further submitted that even when a person tried and acquitted, the appellate Court hearing an appeal of the conviction of the co-accused, though entitled

to say that the acquittal was bad, cannot convict Shri Kukreja. The Court has to decide the appeal on objective assessment and consideration of the evidence and, therefore, if sufficient reliable evidence against the accused are available then their conviction has to be sustained. Criminal cases are not matters of subjective satisfaction, subjective satisfaction is a matter of relevance in the cases of preventive detention only and not otherwise. Benefit of doubt can be given on appreciation of evidence and not on a ground that some one whose involvement is doubtful was not sent for trial alongwith the other accused against whom good amount of evidence is available.

44. Mr.Nanavati further submitted that the provisions contained under Sections-169, 170 and 173 of the Criminal Procedure Code clearly show that the person can be sent for trial only if there is a sufficient evidence

available against him. It is a matter of discretion and opinion of the investigating officer to register the case against the accused against whom the material evidence is available and his involvement in the offence is actively proved. Even when it is found that investigating officer has wrongly not included as accused, at the most Court will have to scrutinize and examine the evidence with due care.

45. Mr.Nanavati further submitted that the Criminal Procedure Code has not conferred any power to the appellate Court to set aside a conviction of a person qua tried and convicted on the ground that the some persons who ought to have been tried alongwith convicted persons have not put up for trial. Non filing of complaint against a person who appears to be involved in the offence does not amount to any finding nor it can be said to be illegality or irregularity in

proceedings and, therefore, the Court has no power to set aside the conviction on such a irrelevant ground. Even the evidence is led by the prosecution against the persons who are tried and even if that evidence is sufficient to sustain the conviction then the High Court cannot set aside the conviction on the ground that why the other persons appearing to be involved in the offence were not tried. It would be an irrelevant consideration in a criminal trial.

46. In support of above submissions Mr.Nanavati has relied on the following decisions;

(a) In **Chandrakant Luxman V/s. State of Maharashtra, (1974) 3 SCC 626**, the Hon'ble Supreme Court has held that the benefit of any defective investigation cannot go to the prosecution. But, if it were to appear that the story narrated by 'A' immediately after the incident was in material particulars

different from the evidence of the eye-witnesses the benefit of such an infirmity would have gone to the accused, but if on a proper evaluation of the various facts and circumstances, it transpires that the apparent inconsistencies in the case of the prosecution are solely the result of remissness on the part of the investigating officer and not of any improvement or prevarication on the part of the prosecution witnesses, there would be no justification for discarding the accusation.

(b) In **State of U.P. V/s. Jagdeo and others, (2003) 1 SCC 456**, the Hon'ble Supreme Court has held that assuming the investigation was faulty, for that reason alone the accused persons cannot be let off or acquitted. For the fault of the prosecution, the perpetrators of such a ghastly crime cannot be allowed to go scot-free.

47. On the basis of the aforesaid submissions

and the statutory provisions as well as the case law Mr.Nanavati has submitted that the learned trial Judge has perused the entire record, documents and material placed before him for his consideration and he has considered all the relevant and material documents and the case law and come to the conclusion that non examination of a persons, namely, Lalchand Kukreja, who appears to be involved in the offence was not tried does not have any bearing to the facts of the present case. This Court being the Appellate Court cannot consider the plea that non examination or non-inclusion of a particular person in the present case will also give a benefit of doubt to the other persons who were tried and convicted by the Sessions Court. On this ground the case of prosecution cannot be declared as defective or erroneous. The learned trial Judge after scrupulously scrutinizing the material and the documents available with him has not

thought it fit to appreciate the argument canvassed by the accused at the time of hearing of the trial and, thereafter, he has not found it necessary and proper to induct and implead Shri Kukreja as an accused. He has, therefore, submitted that the order and judgment passed by the learned trial Judge convicting and sentencing all the six accused cannot be interfered with.

48. Mr.K.P.Raval, the learned Additional Public Prosecutor appearing for the respondent No.1 – State of Gujarat has not made any independent submission and virtually adopted the arguments and submissions made by Mr.Nanavati, appearing for the NCB.

49.We have extensively heard the learned advocates appearing for the respective parties and have given our anxious thought to their submissions. We have minutely and carefully gone through the pleadings of the

parties as reflected in all these appeals. Oral as well as documentary evidence produced on record and authorities cited before the Court have also received our due attention. We have undertaken the complete and comprehensive exercise of appreciating vital features of the case and the entire evidence on record with reference to broad probabilities of the case. We have also gone through the entire testimonial connection. We have applied our mind to the impugned judgment and order passed by the learned Sessions Judge, Vadodara convicting the accused and sentencing them for R.I of 10 years and fine of Rs.1 lac each and in default thereof to undergo further S.I of six months, except the accused No.5 to whom the sentence of R.I of 5 years with fine of Rs.50,000/- and in default thereof, further S.I of 3 months was awarded.

50. In order to find out whether the

prosecution has established the charge against all the six accused beyond the reasonable doubt and whether the learned Sessions Judge, Vadodara has recorded just and correct conclusion holding them guilty, we may first advert to the oral testimonies of the prosecution witnesses. The prosecution has produced their witnesses to depose before the learned Special Judge. All the witnesses either they are panchas who drew the panchnamas or Investigating Officers, Director – NCB, Superintendent of Police from whom the information was received by the Director – NCB and FSL Expert

PW-1 Rambabu Naidu, Ex.62 is the panch witness, who drew the panchnama on 11.3.1998 and 12.3.1998. PW-2 – Ashok J. Shah, Ex.68 is also a panch witness who drew panchnama at Ahmedabad on 14.3.1998. PW-3 – Jitendra N. Raghuvanshi, Ex.104 is the Intelligence Officer, who has investigated and carried out

raid and who has recorded statements of accused and arrested and produced them before the Magistrate. PW-4 – Pavansingh Tomar, Ex.146 is the Director – NCB, who has received information from Mr.Vivek Shrivastava – S.P.(ATS) and who was with the team and supervised the entire raid proceeding. PW-5 Vivek Shrivastava, Ex.153 is the Superintendent of Police (ATS), who has passed on the information to Mr.Tomar in writing. PW-6 Dr.Nirmal Jagdishkumar Ex.160 is the FSL Officer, who has given his report dated 3.6.1998 at Ex.163. PW-7 Amish Modhia, Ex.167 is an independent witness carrying on the business in the name of Arvind Engineers. He supplied punchs to the accused No.1. PW-8 D.N.Oza, Ex.177 is the Intelligence Officer who has investigated the entire offence.

51. The case of the prosecution is also based on the confessional statements made by the accused under Section-67 of the Act.

51.1 Statement of accused No.1 was recorded on 13.3.1998. His statement revealed that he was engaged in medical profession (Ayurvedic). One and half years back from the date of incident he met Gaffarbhai, who suggested him to manufacture mandrax tablets which was quite profitable business. He explained accused No.1 the formula to manufacture mandrax tablets and gave its formula to him. He received order to manufacture mandrax tablets from accused No.4 who gave him Rs.1 lac by way of advance. Shri Lalchand Kukreja arranged raw materials, dies and punchs used in manufacturing mandrax tablets. On the basis of his statement the residential premises of accused No.1 was searched on 13.3.1998. During the course of search, chemicals, apparatus, utensils etc were found and seized. Consequently, his further statement was recorded on 13.3.1998 wherein he confessed that the chemicals found from the adjoining

rooms of his residential premises were in fact the left over of the raw materials/powders and papers reflected the expenditure incurred for purchase of raw materials. The accused No.1 was further examined on 16.3.1998 when he was in the custody of NCB, Ahmedabad wherein he stated that the raw materials were mainly procured from Vipul Chemicals , Prop. Mahesh Patel, accused No.5.

51.2 Statement of accused No.2 was recorded on 13.3.1998. His statement revealed that he knew accused No.3 Dilip H. Joshi – Managing Director of Rollex Pharmaceuticals Ltd., with whom he negotiated for making mandrax tablets for Rs.40,000/-. He confessed his involvement in the crime and provided his vehicle for transportation of the seized drug. He was again examined on 16.3.1998 while he was on remand.

51.3 Statement of accused No.3 was recorded on

13.3.1998 at the factory premises wherein he confessed that the accused Nos.2 and 3 have decided to do the job for the consideration of Rs.40,000/- out of which Rs.10,000/- was to be paid to accused No.2. His further statement was recorded on 16.3.1998 wherein he once again confessed his crime and stated that money amounting to Rs.1.5 crore received from the public issue of Rollex Pharmaceuticals Ltd., has been diverted and due to financial difficulties, he indulged in this crime.

51.4 From the above referred confessional statements and incriminating materials found and seized, it is proved beyond any reasonable doubt that not only their confessional statements but other independent and corroborated evidence established their link with the commission of crime. All of them were found present at the scene of offence. Left over raw materials and papers were found from the residential premises of accused No.1. Car

belonged to the accused No.2 and from the dicky of the said car mandrax tablets were found. Factory premises belonged to Rollex Pharmaceuticals Ltd., and the accused No.3 was the Managing Director of the said Company. Thus, offence against the accused Nos.1, 2 and 3 was proved beyond any reasonable doubt.

51.5 Statement of accused No.4 was recorded on 13.3.1998. He was the alleged purchaser of the mandrax tablets. He came to the scene of offence subsequently when the tablets were loaded in the dicky of the car. It is revealed from his statement that he paid Rs.1 lac to the accused No.2 and requested for the sample. After checking the quality, he further paid Rs.1 lac to the accused No.1 and finalised the deal of one lac tablets for Rs.4 lacs and one Mr.Rajnikant, the purchaser was to pay Rs.5 lacs to him. His further statement was recorded on 16.3.1998 when he was in custody which referred to his alleged involvement in

other cases. Except these confessional statements, no independent evidence was found against him. Neither any amount, contraband article or vehicle for transportation was found from his possession.

51.6 Statements of accused No.5 was recorded on 23.3.1998, 26.3.1998 and 21.4.1998. His statements revealed that he supplied chemicals to the accused No.1. He was not authorised to deal in sale and purchase of Acetic Anhydride, a controlled substance. It is, however, nowhere stated in any of the statements that it was within his knowledge that the contraband substance supplied by him would be used for manufacturing of mandrax tablets.

51.7 Statement of accused No.6 was recorded on 21.4.1998 wherein he confessed his involvement in illegal purchase and sale of Acetic Anhydride. He also confessed to supply 70 liters of Acetic Anhydride to the accused

No.5. Except this statement no incriminating material was found from his profession nor his presence was alleged at the scene of offence.

51.8 Upon perusal of the confessional statements of accused Nos.4, 5 and 6 recorded under Section-67 of the Act and even upon perusal of the confessional statements of accused Nos.1, 2 and 3 inculpating accused Nos.4, 5 and 6, it appears to us that the case of accused Nos.4, 5 and 6 stands on different footing and it is not just and equitable to treat them on the same line as accused Nos.1, 2 and 3 are treated. There is no direct or independent evidence against them. It is true that their inculpatory confessional statements can be a basis of their conviction. The Court, however, cannot escape from its responsibility of examining or evaluating of these statements on the touchstone of their voluntariness truthfulness and corroboration. They cannot always be accepted as gospel truth. It is

alleged that these statements were recorded under threat, duress or coercion. They were said to have been recorded in the presence of ATS Personnels. Accused have retracted their statements at the time of recording of their further statement. Accused No.6 has retracted his statement much earlier. Panchnama drawn appears to be a prepared one and the panch witness has simply performed his duty of signing the panchnama. Evidence of NCB officials and ATS Personnels is strong enough to prove the statutory compliance of the provisions of the Act and charges against accused Nos.1, 2 and 3. Their evidence, however, failed to prove the charges or establish the link of the accused Nos.4, 5 and 6 with the offence beyond any reasonable doubt.

52. From the detailed examination and analysis of the prosecution witnesses and the documentary evidence produced on record by

the prosecution, it appears to us that various discrepancies, contradictions, omissions and infirmities are found in the oral as well as documentary evidence. Though several contentions were raised before the Special Court as well as before this Court and we found substance therein, we, however, confined ourselves to deal with the strong protest lodged against the non-compliance of the statutory provisions and intrinsic worth and reliability of the statement recorded under Section-67 of the Act as well as failure on the part of the prosecution to implicate the persons like Gaffar and Kukreja, who are closely associated and connected with the commission of offence. We do not disturb the finding recorded and conclusion drawn by the learned Sessions Judge, Vadodara so far as the conviction and sentence imposed on accused Nos.1, 2 and 3 is concerned as they were very much present at the place of commission of the offence and

also the contraband articles, namely, mandrax tablets were found from the premises of the Pharmaceutical Company of which the accused No.3 was the Managing Director and it was duly supported and corroborated by the confessional statements recorded under Section-67 of the Act showing their involvement in the manufacturing of such mandrax tablets. The case of the accused Nos.4, 5 and 6, however, stands on different footing. Their confessional statement recorded under Section-67 of the Act do not get any corroboration from any independent evidence and having regard to their retraction as well as the infirmities found on record on the part of the prosecution we are not persuaded to confirm the conviction and sentence imposed upon them and they deserve for benefit of doubt looking to the peculiar facts of the present case.

53. On the evidence of aforesaid witnesses as

well as material produced by the prosecution it can hardly be established that the accused Nos.4, 5 and 6 have committed an offence with which they are charged. Thus, on close scrutiny of the evidence and considering the statutory provisions and judicial pronouncements on the subject matter, we express our inability to confirm the finding, ultimate conclusion and resultant order of conviction and sentence recorded by the learned Sessions Judge, Vadodara qua accused Nos.4, 5 and 6. We are not in agreement with the said findings and ultimate conclusion and resultant order of conviction and sentence as according to us the conclusion arrived at by the learned Sessions Judge, Vadodara is not tenable at law looking to the facts and in the circumstances of the case.

54. We, however, find ourselves in conformity with the findings and ultimate conclusion and resultant order of conviction and sentence

recorded by the learned Sessions Judge, Vadodara qua accused Nos.1, 2 and 3. We are in complete agreement with the said finding, ultimate conclusion and resultant order of conviction and sentence as according to us no other conclusion is possible except the one reached by the learned Sessions Judge, Vadodara on the facts and circumstances of the case. So far as these three accused are concerned, we find no infirmity in the reasoning of the learned Sessions Judge, Vadodara. The evidence has been carefully noticed and fully appreciated in the reasoned judgment and according to us we do not think it right to further give any reason than what has been given by the learned Sessions Judge, Vadodara in the impugned judgment and order. In this view of the matter, we are not inclined to interfere in the order and judgment of the learned Sessions Judge qua accused Nos.1, 2 and 3.

55. Having regard to peculiar facts of the present case and in light of the decisions referred to hereinabove and principles laid down therein, this Court is of the view that the conviction order passed against the accused Nos.4, 5 and 6 cannot be sustained. The order of learned Sessions Judge, Vadodara dated 22.11.2001 convicting the accused Nos.4, 5 and 6 for the offences punishable under the Act and sentencing R.I of 10 years and fine of Rs.1 lac each and in default thereof to undergo S.I for 6 months qua accused Nos.4 and 5 and R.I of 5 years and fine of Rs.50,000/- and in default thereof to undergo S.I of 3 months qua accused No.6 is hereby quashed and set aside. In Criminal Appeal Nos.61/2002, 941/2001 and 942/2001 original accused Nos.4, 5 and 6 are hereby acquitted from the charges levelled against them. Since the accused Nos.5 and 6 are on bail their bail bonds are cancelled. Respondent – State of Gujarat and jail

authority is hereby directed to release the accused No.4 from the jail forthwith, if his presence is not required in any other case. Amount of fine, if any, paid by the accused Nos.4, 5 and 6 shall be refunded to them forthwith.

56. In the result Criminal Appeal Nos.51 of 2002, 60 of 2002 and 943 of 2001 are dismissed and Criminal Appeal Nos.61 of 2002, 941 of 2001 and 942 of 2001 are allowed.

(A.M. KAPADAI, J.) (K. A. PUJ, J.)

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